COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2015-SC-000094-D
(2013-CA-000309)

KENTUCKY RETIREMENT SYSTEMS — APPELLANT

V.

DIANNE CARSON — APPELLEE

BRIEF FOR APPELLEE

Respectfully submitted,

DIANNE CARSON

Hon. Michael P. Sullivan
Hon. Elizabeth A. Coleman
Sullivan Law Office
1500 Story Avenue
Louisville, KY 40206
Telephone: (502) 587-0228
Facsimile: (502) 587-1433

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

The undersigned does hereby certify that true and accurate copies of this brief were served upon the following named individuals by U.S. Mail, First Class, this 15th day of January, 2016: Hon. Phillip J. Shepherd, Judge, Franklin Circuit Court, 222 St. Clair Street, Frankfort KY 40601; Hon. Joseph P. Bowman, Kentucky Retirement Systems, 1260 Louisville Road, Frankfort, KY 40601; Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601. The undersigned further certifies that the Record on Appeal, from the Clerk of the Court of Appeals, has not been withdrawn by counsel for Appellee.

COUNSEL FOR APPELLEE

INTRODUCTION

This is an appeal from the Kentucky Court of Appeals' January 23, 2015, Published Opinion, which determined the Franklin Circuit Court correctly determined the doctrine of *res judicata* was not applicable to Appellee's second disability application, and as a result of the incorrect application, the Kentucky Retirement Systems failed to consider all of the evidence in Appellee's application for disability benefits and was therefore not supported by substantial evidence. This Court should affirm.

STATEMENT CONCERNING ORAL ARGUMENT

Dianne Carson does not desire an opportunity for oral argument in this case. The Kentucky Revised Statute concerning disability retirement provides for the filing of a second claim within 24 months of the last date of paid employment, and the statutory language states that "reapplication *based on the same claim of incapacity shall be accepted and reconsidered for disability* if accompanied by new objective medical evidence." KRS 61.600(2). This case is a straightforward application of the statute, and as no complex legal issue exists, oral argument would not assist the Court in its determination of the case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

I. Introduction

Ms. Dianne Carson (hereafter "Ms. Carson" or "Appellee") does not accept Kentucky Retirement Systems' (hereafter "Appellant") statement of the case. Ms. Carson is a now 64-year-old woman and her date of birth is April 28, 1951. She became a member in the Kentucky Retirement Systems beginning August 15, 1997. She last served as a Disability Adjudicator I in the state office of Disability Determination Services with her last day of paid employment on March 21, 2008. (A.R., p. 7). This job is categorized as sedentary work by both Ms. Carson and her former employer. (A.R., p. 7, 15). Despite the lower exertional level required, the position imposed significant stress on Ms. Carson caused by the demands of a 100 case per year caseload. (A.R., p. 187-189). Prior to this position, Ms. Carson worked for the Kentucky Commission of Human Rights as a legal secretary, and before that, she worked for the Commission for Children with special needs as a transcriptionist and secretary. She accrued 10.58 years of service.

II. First Application for Disability Retirement

Appellee filed her initial application for disability retirement benefits on November 21, 2007 (A.R., p. 2-6). The application was referred to a three-member medical review board as required under the provisions of KRS 61.600(3) and 61.665. After the medical review board recommended denial, Appellant

denied the application on March 5, 2008. (A.R., p. 78-85). Ms. Carson requested a second review by the medical review board who again recommended denial, resulting in the Appellant denying the application a second time on May 16, 2008. (A.R., p. 112-116). Ms. Carson then timely filed a request for administrative hearing on June 2, 2008, (A.R., p. 117). This hearing was held December 19, 2008. (A.R., p. 187-189). After briefing of the issues by both parties, the hearing officer issued his Report and Recommended Order on June 1, 2009, recommending denial of the application. (A.R., p. 219-236). After Ms. Carson filed exceptions to this recommended order, the KRS Board of Trustees issued a Final Order denying the application on August 24, 2009. (A.R., p. 245-246). Kentucky Retirement Systems' Board of Trustees issued a decision denying this November 21, 2007 application on August 24, 2009. (A.R., 247-250).

III. Second Application for Disability Retirement

Under the provisions of KRS 61.600(2)[1], Ms. Carson then filed her second application for disability retirement benefits on October 21, 2009 (A.R., p. 247-250). The primary medical bases of the claim were severe left ventricular dysfunction secondary to myocarditis, fibromyalgia, and chronic fatigue syndrome. (*Id.*). This application followed a similar process as Ms. Carson's first application. The application was submitted to the three-member medical review board. Two members of this board recommended denial of the application (A.R.,

[1] Kentucky Revised Statute 61.600(2) states,

> A person's disability reapplication based on the same claim of incapacity shall be accepted and reconsidered for disability if accompanied by new objective medical evidence. The reapplication shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment in a regular full-time position.

p. 439-442) while the third member of the medical review board, Dr. Roger Strunk, M.D., suggested approval of the application based upon Appellee's nonischemic cardiomyopathy and "chronic pain syndrome, felt similar to or related to fibromyalgia, possibly related to the replacement of the pacemaker defibrillator." (A.R., p. 445-447).

The Appellant denied this application initially on March 17, 2010. (A.R., p. 448-456). Appellee requested a hearing and the issue of *res judicata* was raised by Appellant in the August 4, 2010, status conference, which was to be addressed in the parties' position statements. (AR, p. 615-616.) A hearing was held on October 10, 2010. Thereafter, the parties submitted their respective Position Statements, in which Appellant argued against *res judicata* being applicable to the case. (AR, p. 638-646.) (Appendix 1.) The parties then submitted Reply Statements, again with Appellant's argument opposing the application of *res judicata*. (AR, p. 648-650.) (Appendix 2.) The hearing officer issued his Report and Recommended Order recommending denial of the application on March 21, 2011. (AR, p. 661-681.) Claimant, Appellee, filed her Exceptions incorporating the arguments she made in her Position and Reply Statements. (AR, p. 682-685.) The Kentucky Retirement Systems Board of Trustees adopted this recommended order and denied the application on May 16, 2011. (AR, p. 686-687.)

IV. Appeal to Franklin Circuit Court

Having exhausted her administrative remedies, Ms. Carson timely filed suit in Franklin Circuit Court appealing the application of *res judicata* to her

second application for benefits. The case was heard by the Honorable Phillip Shepherd, who, after being briefed by both parties, reversed and remanded the decision of Appellant.

In his Opinion and Order, Judge Shepherd noted KRS 61.600(2) states

> A person's disability reapplication based on the same claim of incapacity shall be accepted and *reconsidered* for disability if accompanied by new objective medical evidence. The doctrine of *res judicata* stands for the principle than an applicant cannot relitigate the same facts and issues. *See* E.F. Prichard Co. v. Heidelberg Brewing Co., 234 S.W.2d 486 (Ky. 1950). However, the reconsideration of medical evidence as required by KRS 61.600(2) is not tantamount to relitigation of the same facts and issues and is not foreclosed by *res judicata.*

See Opinion and Order, p. 6. Judge Shepherd goes on to find "that in order for KRS to comply with the plain language and purpose of KRS 61.600(2), it must necessarily consider any new objective medical evidence within the context of any previously submitted medical evidence of incapacity submitted with the previous application." *Id.* Failure to do this, he notes, "would render reapplication for disability benefits virtually futile." *Id.*

Following Judge Shepherd's decision, the Appellant sought review before the Appellate Court.

V. Kentucky Court of Appeals

A three judge panel assigned to the case, Judges Kramer, Taylor, and Van Meter, affirmed Judge Shepherd's Franklin Circuit Court order in a published opinion issued January 23, 2015. The Appellate Court correctly held,

> In our view, however, administrative *res judicata* does not apply because the statute [KRS 61.600(2)] very clearly permits the filing of a 'reapplication based on the same claim of incapacity...and reconsidered for disability if accompanied by new objective medical

> evidence." The legislature, by the language in the statute, has modified the traditional concept of *res judicata* which would otherwise prohibit the refiling of a claim based on the same incapacity. Opinion, p. 12.

Additionally, the court made specific reference to the Appellant's reliance upon two unpublished cases, Howard v. Kentucky Ret. Sys., 2012 WL 5603579 (Ky. App., Oct. 11, 2013) (2012-CA-001488-MR), and Hoskins v. Kentucky Ret. Sys., 2011 WL 112147 (Ky. App., Jan. 14, 2012) (2009-CA-000905-MR). As stated, the court clearly considered these prior decision and found those cases did not "compel a different result" in the case at hand. Opinion, p. 13. Appellee will distinguish the prior decisions in the argument below.

Kentucky Retirement Systems motioned for Discretionary Review to this Honorable Court which was granted on February 20, 2015.

ARGUMENT

I. Standard of Review

The standard of review for an administrative agency's decision depends on whether it is review of question of law or fact. For a factual issue, the standard of review is the arbitrary and capricious standard. As stated by the Kentucky Court of Appeals in *McManus v. Kentucky Retirement Systems*, "a reviewing court is not free to substitute its judgment for an agency on a factual issue unless the agency's decision is arbitrary and capricious. *McManus*, Ky. App., 124 S.W.3d 454, 458 (2003). In determining whether an agency's opinion was arbitrary and capricious, the reviewing court should look to the following factors:

> The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them.... Second, the court should examine the

> agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence.... If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary.

Bowling v. Natural Resources and Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406, 409 (1994) (internal quotation marks and citation omitted). Conclusions of law, on the other hand, are reviewed *de novo. Aubrey v. Office of Attorney General,* Ky. App., 994 S.W.2d 516, 519 (1998).

II. The Franklin Circuit Court and Court of Appeals Properly Considered Appellee's Argument Objecting to the Application of *Res Judicata.*

A. Ms. Carson's Briefs Put the Hearing Officer and Board on Notice of the *Res Judicata* Argument

Ms. Carson properly preserved and raised the issue of *res judicata* before the Appellant, permitting the issue to be raised on appeal before the Franklin Circuit Court and Court of Appeals. Because the final Order from Kentucky Retirement Systems is made following an extensive review of the entire record, including the Position Statements, Reply Briefs, and exceptions, both the Hearing Officer and Board of Trustees were on notice of the *res judicata* argument.

This Court has held that an error cannot be raised on appeal for the first time. *Fischer v. Fischer,* Ky., 348 S.W.3d 582, 588 (2011). The reason for this rule, notably, "is to give the trial court a reasonable opportunity to consider the question during the trial so that any problem may be properly resolved at that time, possibly avoiding the need for an appeal." *Id.*

Prior to the hearing, a status conference held August 4, 2010, explicitly noted the Appellant sought for application of *res judicata* to the case, and the parties were directed to brief the issue in their Position Statements. (AR, p. 615-616.). Following the hearing, the parties filed Position Statements and Reply Briefs. The parties complied with this requirement. In Carson's Position Statement, she succinctly and specifically alleged that *res judicata* did not apply when filing a second application with the Kentucky Retirement Systems under KRS 61.600(2). (AR, p. 639.) (Appendix 1). In fact, Appellant devoted five pages to its position that *res judicata* did apply to bar Carson's claim. In Appellant's Reply, *res judicata* was again discussed. (AR, p. 648-650.) (Appendix 2.).

In reaching his Findings of Fact, Conclusions of Law and Recommended Order, the Hearing Officer reviewed, in addition to other items, "the Position Statements and Reply Briefs of the parties...." (AR, p. 664.). Following the Recommended Order, Ms. Carson filed Exceptions, explicitly stating, "The Claimant hereby incorporates by reference her Position Statement and Reply Statement as if fully set forth herein." (AR, p. 682.). In issuing its final decision, the Board of Trustees considered the administrative record as well, which would have included the Position Statements, Reply Briefs, and Exceptions. (AR, p. 686.).

Additionally, the Hearing Officer and the Board of Trustees had ample notice that *res judicata* was at issue in Carson's reapplication for benefits, as contemplated by *Fischer v. Fischer*, Ky., 348 S.W.3d 582 (2011). There was

ample written documentation of the opposing positions of Ms. Carson and the Kentucky Retirement Systems to put the Hearing Officer and the Board of Trustees on sufficient notice that it was a contested issue to be decided. In fact, the Hearing Officer did decide that *res judicata* was applicable, which is specifically the issue brought for review before the Franklin Circuit Court through this Court. (AR, p. 661.).

B. Claimant Incorporated *Res Judicata* Arguments in Her Exceptions

In its brief, Appellant argues *res judicata* was not raised in Ms. Carson's exceptions to the hearing officer's recommended order, and the failure to except findings that are adopted in the agency final order bars further review, relying upon *Rapier v. Philpot*, Ky. 130 S.W. 3d 560 (2004) and *West v. Kentucky Ret. Sys.*, Ky., 413 S.W. 3d 578, 583 (2013). Appellant's argument fails because Appellee *did* raise the issue of *res judicata* in her exceptions.

Appellant's reliance upon *Rapier* and *West* is misplaced. In *Rapier*, Philpot was terminated and appealed his dismissal through the administrative agency. *Rapier*, Ky., 413 S.W.3d 560, 561 (2004). Ultimately, Philpot failed to file any exceptions to the decision of the Hearing Officer whatsoever. *Id.* Because Philpot failed to file any exceptions whatsoever, this Court found the only issues that could be reviewed were those in the Final Order that varied from the Hearing Officer's Recommended Order. *Id.* at 563-4. The case, in general, does stand for the determination that for review, exceptions must be filed. *Id.*

In *West*, the court did note the "cumulative effect" of medical conditions was not preserved by the claimant in his exceptions filed with the Kentucky

Retirement System. *West v. Kentucky Ret. Sys.*, Ky., 413 S.W.3d 578, 583 (2013). There is nothing in *West* other than this cursory statement regarding the argument not being raised in West's exceptions. *Id.* Ultimately, the Court did find the cumulative effect was addressed in the court's opinion, so the issue was resolved on other grounds. *Id.*

In Appellee's Reply Statement, Ms. Carson specifically addressed the issue of *res judicata* stating,

> res judicata does not apply when filing a new application for disability in the Kentucky Retirement Systems, because KRS 61.600(2) provides that a "reapplication based on the **same claim** of incapacity **shall be accepted and reconsidered** for disability if accompanied by new objective evidence." (Emphasis in the original).

In her Position Statement, Appellee argued similarly. *Claimant's Position Statement*, p. 2. By incorporating and setting forth her earlier arguments as stated in her Position Statement and Reply Statement Ms. Carson did preserve these issues for later judicial review and has complied with the holdings of *Rapier*.

Taking the position that a prior submitted and reviewed brief to the court must be copy and pasted into the Exceptions would be burdensome to the Hearing Officer to review and quite frankly redundant. The Appellee's argument and position opposing the application of *res judicata* was clear and referenced in her Exceptions.

C. Carson's Exception was Argued with Specificity

Further, the Appellant argued in its brief that the issue of *res judicata* was not properly set forth in the exceptions because the language was too general

and therefore the issue was not preserved for appeal. However, in *Givens v. Commonwealth of Kentucky,* this Court gave several examples of language that was considered too general, as well as language that was sufficient to preserve appeal. *Givens v. Com,* Ky. App., 359 S.W.3d 454, 462-463 (2011). In *Givens,* it was noted that objections such as "'irregularity in the proceedings of the court and in the prevailing party, by which the plaintiff was prevented from having a fair trial'; 'error of law occurring at the trial'; and, 'the verdict was contrary to law'" are insufficient to qualify as preservation of error. *Id.* However, the Appellee's exceptions were not couched in such general terms. Instead, the Appellee incorporated by reference her objections contained in the body of her Position Statement. *Claimant's Position Statement*, p. 2.

Additionally, citing *Challinor v. Axton*, the Court noted the purpose of requiring objections:

> A clear, concise statement of a party's objection or objections obviates the need for the agency head or the Court, on subsequent judicial review, to guess at, or decipher, the party's intended argument regarding error. For this reason, even properly filed exceptions, containing objections "couched in general terms with no specification of any concrete or particular error...are insufficient to authorize us or the court below to consider or to disturb the verdict for any alleged error, though valid, that may be argued as embraced in such general language." *Challinor v. Axton*, 246 Ky. 76, 54 S.W.2d 600, 601 (1932).

Givens v. Com, Ky. App., 359 S.W.3d 454, 462 (2011). The Appellee's exceptions were not so general that the intended argument had to be deciphered or guessed at. The argument was clearly and succinctly laid out in the Claimant's Position Statement, which was incorporated by reference. The Board of Trustees merely had to refer to the Appellee's referenced statement, which it

had ready access to in order to determine the Appellee's issue with the Hearing Officer's decision.

D. *Kroger* is Inapplicable to Carson

Finally, The Appellant argues that *Kroger Ltd. Partnership v. Cabinet for Health and Family Services,* 2007 WL 4553667 (Ky. App.) is applicable to this case. However, the facts in this case are distinctly separate from the facts in *Kroger.* In *Kroger,* the Court of Appeals found the exceptions were too general in nature to preserve issues for judicial review, noting that "[w]e simply do not see how a pleading submitted to the ALJ on April 15, 2005, can preserve complaints that did not arise until the ALJ issued his decision a month later on June 15, 2005." (*Id.* at 12.). However, in the case at bar, the issue of *res judicata* was raised at the hearing, and Appellant and Appellee were on notice at the time the Claimant's Position Statement was written, and so the complaint had arisen prior to the Hearing Officer's decision. Further, a close examination of the exceptions filed by Kroger reveals that it never incorporated by reference any documentation that clearly spelled out its argument. (*Id.* at 8-9.). This is factually distinct from the current case, and therefore should not be applied.

III. Franklin Circuit Court and the Court of Appeals Correctly Found *Res Judicata* Does Not Apply To Exclude The Medical Evidence From A Prior Decision From Being Reexamined In Light Of New Objective Medical Proof On A Second Application For Kentucky Retirement Systems Disability Retirement.

A. Submission of New Medical Evidence in Reapplication for Disability Precludes *Res Judicata*

The statutory requirements necessary to file a second disability claim with the Kentucky Retirement Systems is inherently designed to prevent the

application of *res judicata.* The plain language of KRS 61.600(2) unequivocally requires the Appellant to adjudge the same disability claim twice. In other words, the judicial principal of *res judicata* is inapplicable when a second claim for disability retirement benefits is submitted under KRS 61.600(2).

In Kentucky, statutes are to be "liberally construed with a view to promote their objects and carry out the intent of the legislature." KRS 446.080(1); *Ky.Workforce Dev. Cab. v. Gaines*, Ky., 276 S.W. 3d 789 (2008). In addition, words and phrases are to "be construed according to the common and approved usage of language" unless a word has a certain technical meaning. KRS 446.080(4). Further, when a court construes statutory provisions, it must presume "that the legislature did not intend an absurd result." *Gaines, supra, citing Commonwealth, Cent. State Hosp.v. Gray*, Ky., 880 S.W.2d 557 (1994); *see also Renaker v. Commonwealth,* Ky. App., 889 S.W.2d 819, 820 (1994), *Williams v. Commonwealth*, Ky. App., 829 S.W.2d 942, 944 (1992). Interpreting the language of KRS 61.600(2) in such a manner would result in just such an absurd result.

KRS 61.600(2) states:

> A person's disability reapplication based on the **same claim** of incapacity shall be accepted and reconsidered for disability if accompanied by new objective medical evidence. The reapplication shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment in a regular full-time position. (Emphasis supplied).

As defined by *Black's Law Dictionary,* 905 (6th ed. 1991), *res judicata* is a judicial doctrine which "constitutes an absolute bar to a subsequent action involving the **same claim**...." (Emphasis supplied). The statute explicitly

authorizes the "**same claim**" be accepted and reconsidered. *Res judicata* cannot be applicable when the express legislative intent requires the same claim be reconsidered.

Res judicata does preclude litigating an issue "**exactly the same** as the previously litigated claim or issue." *Kentucky Administrative Law*, 2nd Ed. § 12.32 (UK/CLE) (2006). (Emphasis supplied). Ultimately, however, a second claim for disability based on an identical claim will never occur, because KRS 61.600(2) requires "new objective medical evidence" accompany the reapplication. It is only when a second claim without any new evidence is submitted that *res judicata* will apply, as the second claim would then be identical to the first.

B. KRS 61.600(2) Requires All Evidence Be Considered

With the rules of statutory construction in mind, KRS 61.600(2) should be interpreted to allow the consideration of the evidence considered as part of Ms. Carson's earlier application. The online version of *The Merriam-Webster Dictionary* defines "reconsider" as, "to consider again especially with a view to changing or reversing." *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/reconsidered, published 2013, viewed August 20, 2013. This is "the common and approved usage" of this term. Similarly, the term "same" is defined as:

> 1 *a* : resembling in every relevant respect
> *b* : conforming in every respect —used with *as*
> 2 *a* : being one without addition, change, or discontinuance: identical
> *b* : being the one under discussion or already referred to
> 3: corresponding so closely as to be indistinguishable

4: equal in size, shape, value, or importance —usually used with *the* or a demonstrative (as *that, those*) in all senses

Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/same, published 2013, viewed August 20, 2013.

Kentucky statutory law defines the term "shall" as meaning mandatory. KRS 446.010(36). Of course, this is to occur only if the reapplication is "accompanied by new objective medical evidence". KRS 61.600(2). The common usage of the term "accompany" is "to be in association with." http://www.merriam-webster.com/dictionary/accompany, published 2013, viewed August 20, 2013.

Further courts are "bound by the words actually enacted ...based upon what they said, not what they might have said." *Commonwealth, Transp. Cabinet, Bureau of Highways v. Roof*, Ky., 913 S.W.2d 322, 326 (1996). The Kentucky Legislature could have drafted the statute in any number of ways that it would specifically preclude the consideration of evidence from a previous application, but it did not. Accordingly, *res judicata* does not bar the consideration of evidence from a previous application for disability retirement benefits because KRS 61.600(2) statutorily bars such preclusion.

Taking these rules into account, if a claimant files a second application and submits new objective medical evidence that is associated with this new application, and bases this second application on a claim of incapacity that is "resembling in every relevant respect" or "corresponding so closely as to be indistinguishable" to her first application, then this application must be accepted and "considered again with a view to changing or reversing." To interpret the

statute in the manner suggested by the Appellant would produce an absurd result.

C. Statutory Procedure Requires All Evidence from First and Second Application be Considered

The Kentucky Retirement System is bound by its statutory guidelines as established by the legislature in KRS 61.600. This statute provides the framework for when and how an application for disability benefits shall be examined. In relevant part, KRS 61.600(3) states:

> Upon the examination of the objective medical evidence by licensed physicians pursuant to KRS 61.665, it shall be determined that:
>
> (a) The person, **since his last day of paid employment**, has been mentally or physically incapacitated to perform the job, or jobs of like duties, from which he received his last paid employment. In determining whether the person may return to a job of like duties, any reasonable accommodation by the employer as provided in 42 U.S.C. sec. 12111(9) and 29 C.F.R. Part 1630 shall be considered; (Emphasis supplied).

The statute requires a determination of disability be made for the period dating back to the claimant's last day of paid employment.

Logically, when a Claimant files a first application, the objective medical evidence will cover a period of time from the last day of paid employment, or just before, through the final order. As is the case here, when a reapplication, which includes new objective medical evidence as required by KRS 61.600(2) is filed, it will not likely have medical evidence spanning the same period; the new evidence will more likely cover the period of time following the close of the first record up to the date of the second application's final decision. To comply with the statutory mandate of determining whether a person is disabled "since his last

day of paid employment," the Kentucky Retirement System has no choice but to consider evidence included in the first case as it contains objective medical evidence of a necessary and relevant time period.

IV. The Present Case is Distinguishable from *Holland*, *Hoskins*, and *Howard*

The Court of Appeals and Franklin Circuit Court's decisions are distinguishable from the prior unpublished Court of Appeals' decisions which briefly reference *res judicata* in cases involving Kentucky Retirement Systems. Appellant argues the decision of the Court of Appeals in the present case overturns years of precedent. *Brief for Appellant*, p. 11. This conclusion is erroneous; each of the three prior Court of Appeals cases is distinguishable or vague in application.

Holland v. Kentucky Ret. Sys., 2003 WL 1256710 (Ky. App., 2003), was decided under the prior version of the statute, KRS 61.600(1)(e), which no longer exists. Under this earlier statutory version, a claimant who filed a second claim for disability with Kentucky Retirement Systems had to show a "substantial change" in his or her medical condition. *Id.* at 1. Whether a claimant met the administrative "threshold requirement" for further consideration was the crux of the Appeals Court's opinion. *Id.* at 3. *Res judicata* was mentioned as a fleeting thought, primarily in a footnote. *Id.* at 4. Ultimately, given the statutory framework was different than the standard now used in 61.600(2), this case is not on point.

The Court of Appeals, in the published opinion of the present case, was aware of the *Hoskins v. Kentucky Ret. Sys.* case and rejected it. *Hoskins v.*

Kentucky Ret. Sys., 2011 WL 112147 (Ky. App., 2011). The case *Hoskins* relies upon, *E.F. Prichard*, was 1950s vintage litigation between two private parties involving a dispute as to the pricing of beer. *E.F. Prichard Co. v. Heidelberg Brewing Co.*, Ky., 234 S.W.2d 486 (1950). The *Hoskins* decision makes only a passing reference to *res judicata*. *Hoskins*, at 452. There is not a significant discussion of the doctrine in either the *Hoskins* or *E.F. Prichard* cases. *E.F. Prichard*, moreover, does **not** involve an administrative action and decisional activity by an agency of the state. It merely stands for the premise that those matters that *could have been presented* in a litigated judicial action are just as barred as those that were actually presented. *E.F. Prichard*, at 487-488. (Citing a 1947 divorce case, *Noel v. Noel*, Ky., 210 S.W.2d 142 (1947). *Prichard* has absolutely nothing to do with a statutorily given right to file a new application, as is the case for Ms. Carson through KRS 61.600(2).

Finally, in *Howard v. Kentucky Ret. Sys.*, 2013 WL 5603579 (Ky. App., 2013), for similar reasons as stated above in *Hoskins*, the case is not persuasive as precedent regarding *res judicata*. Again, the Court of Appeals was aware of this decision when it published the opinion in the present case. In *Howard*, the court's mention of *res judicata* is fleeting, as if an afterthought, and is not supported with any citation to other case law. *Id.* at 2. Ultimately, the Court found there was substantial evidence to support the Board of Trustee's order that the claimant was not disabled without having to address with any vigor any *res judicata* issues. *Id.* at 3.

The Court of Appeals three prior unpublished opinions do not go to the depth of explanation as provided in the Court's published opinion in the present case. As the Court examined the theory of administrative *res judicata* in context of the statute permitting a second application for disability, KRS 61.600(2), the decision is clearly well thought-out and comports with legislative intent.

V. Appellant's Decision Denying Disability Retirement Benefits Is Arbitrary and Capricious as It Does Not Include a Review of the Entirety of the Record

Because the Appellant did not consider the entirety of the medical evidence as part of the reapplication, it did not provide proper due process of law as required by *McManus*, 124 S.W.3d 454, 458 and *Bowling,* 891 S.W.2d 406, 409, *supra.* Had the Appellant considered the medical evidence in its entirety, it would have determined that the Appellee meets the requirements for disability under KRS 61.600, *et. seq.*

In order for a person to qualify for disability retirement benefits, she must have been totally and permanently mentally or physically incapacitated since her last day of paid employment so as to prevent her from performing her former job, or jobs of like duties. The objective medical evidence of record indicates that Ms. Carson meets these requirements. In her reapplication for benefits, Ms. Carson stated that her primary disabling conditions included, "severe left ventricular dysfunction secondary to myocarditis, fibromyalgia, and chronic fatigue syndrome." (AR, p. 250.).

Ms. Carson suffered a heart attack on April 17, 2007. She underwent a left heart catheterization and left ventriculography on that same date which

exhibited an ejection fraction of 35-40%. (AR, p. 31-34.). A chest x-ray taken at the same time noted borderline to mild cardiomegaly without decompensation. (AR, p. 48). An echocardiogram taken on May 17, 2007, indicated the claimant suffered from severe global hypokinesis, mildly dilated left atrium, moderate-severe mitral regurgitation, and moderate tricuspid regurgitation, and estimated the ejection fraction at 25-30%. (AR, p. 22-23.).

Two months after this on July 17, 2007, Ms. Carson's cardiologist Dr. Connie Anggelis, stated, "she [appellee] will remain off of work in the office she still does not have the stamina to return." (AR, p. 28.). Ms. Carson then underwent surgery to have a biventricular defibrillator (pacemaker) implanted on September 20, 2007. (AR, p. 36.).

After the pacemaker surgery, Ms. Carson attempted to return to work under her doctor's restrictions of no more than four hours per day, no sitting or standing for a period longer than 1-2 hours at a time, and no lifting greater than 20 lbs. (AR, p. 9.). Ms. Carson worked under these limitations for two days, but had to discontinue further work due to lightheadedness. (AR, p. 187.).

Since October 2007, the Appellee has continued to become increasingly fatigued and have shortness of breath, with at least one physician reporting that she had dilated cardiomyopathy, significant mitral regurgitation, and an episode of ventricular tachycardia (AR, p.88). Not surprisingly, Dr. Anggelis then repeated her limitation that Ms. Carson remain off of work in a note on October 11, 2007, and again October 29, 2007. (AR, p. 35, 38.). Dr. Anggelis finally

removed Ms. Carson from work "for an indefinite period of time," on November 6, 2007, and again on March 18, 2008. (AR, p. 103.).

In January 2008, Ms. Carson had to undergo an AV optimization, in order to properly recalibrate the pacemaker due to increased shortness of breath and dyspnea on exertion, as well was an episode of ventricular tachycardia. (AR, p. 83).

After switching cardiologists due to an insurance issue, Ms. Carson underwent another echocardiogram on January 9, 2008, which exhibited that her left ventricle was borderline dilated, she had decreased left ventricle ejection fraction of 25-30%, the right ventricular systolic function was mildly impaired, she exhibited moderate-severe mitral regurgitation, and moderate tricuspid regurgitation. (AR, p. 101-102.). On July 29, 2008, Ms. Carson underwent yet another echocardiogram which demonstrated, a reduced ejection fraction of only 15-20% denoting severe left ventricular dysfunction, four-chamber enlargement, moderate mitral regurgitation, mild tricuspid regurgitation. (AR, p. 130-131.). Furthermore, the Appellee was evaluated in November of 2008, in which she was assessed with ventricular tachycardia, chest pain, and fatigue (AR, p.160).

Then in January 2009, Ms. Carson was given a pre-op cardiology evaluation prior to laparoscopic cholecystectomy; she was found to have left ventricular systolic dysfunction, nonischemic cardiomyopathy, fibromyalgia and dyslipidemia. (AR, p.172-175.).

Since the time of the Appellant's denial of Ms. Carson's first application for benefits, Appellee has continued to receive treatment for her heart conditions

with diagnoses of arterial fibrillation, cardiomyopathy, congestive heart failure, and ventricular tachycardia. (AR, p. 279.). She has undergone two AV Optimizations, in January and August 2009, and a right heart catheterization, in March 2009. (AR, p. 326, 404, 430.). Her most recent echocardiogram shows an ejection fraction of 35-40% in the left ventricle. (AR, p. 322.). She was also assessed for a possible heart transplant, but her doctors decided her condition did not warrant a transplant at this point. (AR, p. 281.). On April 21, 2009, cardiologist Dr. David Mann wrote a letter indicating that claimant can only stand for 10-15 minutes, cannot walk further than half a city block, and can only lift 5 pounds. (AR, p. 285.). Dr. Mann also completed a residual functional capacity (RFC) assessment in May 2010. (*Id.*). He stated that Appellee experienced: shortness of breath, fatigue, weakness, dizziness, and sweatiness. (*Id.*). He also indicated that stress increased Appellee's symptoms and fatigue. (*Id.*). He further opined that Appellee was "incapable of even 'low stress' jobs." (*Id.*). Additionally, he felt that Appellee would be absent from work more than four days per month. (*Id.*).

While Ms. Carson's heart conditions are her most severe conditions, they are by no means her only disabling conditions. Ms. Carson is also being treated for chronic fatigue syndrome and symptoms consistent with fibromyalgia. She began experiencing diffuse body pain following her pacemaker defibrillator implantation in September 2007. (AR, pg. 263.). In December 2009, Ms. Carson began seeing a new pain management specialist for these impairments, Dr. Jeffrey Berg. He also completed a residual functional capacity questionnaire in

May 2010. He indicates that Claimant is suffering from Chronic Fatigue Syndrome and fibromyalgia which have also caused anxiety and depression. (AR, p. 471-476.). He states that she has "significant limitations from disability and a worrisome prognosis." (*Id.*). He indicated numerous side effects of Claimant's medications including: concentration and balance impairment, nausea, sedation, and frequent urination. (*Id.* at 10.). He also opined that Claimant was absolutely not a malingerer. He also agreed with Dr. Mann that Claimant is incapable of even "low stress" jobs. (*Id.* at 11.). He goes even further by stating:

> This pt has a strong desire to work. She was gainfully employed prior to her tragic cardiomyopathy. She is unable to maintain gainful employment given the extent of heart damage and the sequela. She also has a chronic debilitating condition that causes pain, fatigue & weakness: Fibromyalgia. Additionally, the medications used to control her chronic pain have significant side effects that cause impaired cognition.

(*Id.* at 475.). Appellant further asserts that the assessments completed by Appellee's treating physicians should be given little or no weight. Appellant criticizes the questionnaires, because they were formulated by Appellee's attorney. However, as Appellant also points out, the burden is on Appellee to provide evidence of her functional limitations and her inability to perform her job. Since Appellant declined to have Appellee's functional limitations assessed by an independent physician, Appellee's treating physicians who have acquired a longitudinal view of Appellee's impairments and limitations are the best source of medical opinion available. As such, Appellee simply requested their opinions. Although the questionnaires were designed by Appellee's attorney, the doctors

were free to elaborate in any way they saw fit. In addition, although Dr. Berg does comment that Appellee has lumbago, he is treating her primarily for chronic fatigue syndrome and fibromyalgia and the assessment he completed specifically questioned him regarding her chronic fatigue and fibromyalgia. Thus, these opinions of Appellee's doctors should be given significant weight.

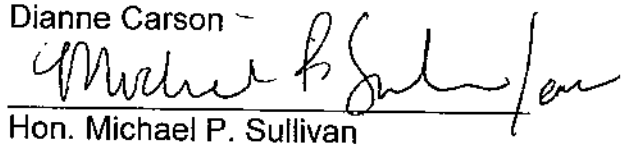
Taking all of this evidence into consideration, it is clear the Appellee's heart conditions along with her chronic fatigue syndrome and fibromyalgia have caused Ms. Carson to be permanently mentally or physically incapacitated since her last day of paid employment so as to prevent her from performing her former job, or jobs of like duties. KRS 61.600(3)(a). By finding the opposite—without a full consideration of the entirety of the evidence—the Appellant has not provided the Plaintiff with full due process of law, and; therefore, has acted arbitrarily and capriciously. *McManus* and *Bowling*, *supra*.

CONCLUSION

The Court of Appeals and the Franklin Circuit Court correctly found the agency erred in applying *res judicata*. Further, because Kentucky Retirement Systems incorrectly applied *res judicata*, all of the evidence relevant to the claim was not considered, and therefore the decision is not supported by substantial evidence. WHEREFORE, Appellee respectfully requests this Court AFFIRM the opinion and order of the Court of Appeals, thereby reversing and remanding the decision back to Kentucky Retirement Systems.

Respectfully Submitted,

Dianne Carson



Hon. Michael P. Sullivan
Hon. Elizabeth A. Coleman
Sullivan Law Office
1500 Story Avenue
Louisville, KY 40206
Telephone: (502) 587-0228
Facsimile: (502) 587-1433

COUNSEL FOR APPELLEE